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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM A. BEAL, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on May 29, 1950.

OPINIONS BELOW

The District Court for the Eastern District of Kentucky did not issue any opinion to accompany its order (R. 18). The opinion of the Court of Appeals for the Sixth Circuit (R. 37) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1950. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the plaintiffs, civilian fire fighters employed by the War Department, were not officers of the United States within the meaning of 28 U.S.C. 1346(d)(2) and hence were not required to bring suit to recover compensation for official services in the Court of Claims but could sue in the district court in the district of their residence.

2. Whether the Court of Appeals erred in holding that the administrative regulations classifying the plaintiffs' hours of actual work as irregular or intermittent, for the purpose of computing overtime pay, were illegal as an abuse of the discretion, vested in the administrative agencies by the overtime pay statutes, to define the class of officers or employees having irregular or intermittent hours of work.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 1346(d)(2), a subsection of the Judicial Code section dealing with the original jurisdiction of the United States District Courts, provides:

> The district courts shall not have jurisdiction under this section of: * * * (2) Any civil action to recover fees, salary, or compensation for official services of officers of the United States.

Article 2, Section 2, Clause 2 of the Constitution provides in part:

> * * * the Congress may by Law vest the Appointment of such inferior Officers, as they

> think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Act of June 26, 1930, 46 Stat. 817, 5 U.S.C. 43, reads as follows:

> There is authorized to be employed in each executive department, independent establishment, and the municipal government of the District of Columbia, for services in the District of Columbia or elsewhere, such number of employees of the various classes recognized by the Classification Act of 1923, as amended (U.S.C., title 5, ch. 13), as may be appropriated for by Congress from year to year: *Provided,* That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment.

The pertinent provisions of the statutes and regulations governing overtime compensation of persons serving the United States as civilian fire fighters are set forth in the Appendix, *infra,* p. 14.

STATEMENT

On October 18, 1948, William A. Beal and thirty other individuals (R. 2) brought suit against the United States in the United States District Court for the Eastern District of Kentucky for a total of $38,809.73 representing unpaid overtime compensation allegedly due them as employees of the United States under applicable compensation stat-

utes.[1] The thirty-one claims are based on common facts and questions of law. During the period from December 1, 1942 to January 1, 1945, plaintiffs were employed by the War Department as fire fighters at the Lexington Signal Depot, located near Lexington, Kentucky. Plaintiffs' employment was authorized by the Act of June 26, 1930, 46 Stat. 817, 5 U.S.C. 43, *supra,* p. 3, empowering each head of a department to employ classified personnel[2] to the extent of his annual appropriation. The department head could delegate to subordinates his authority to employ persons for duty in the field services of a department. (*Id.*)

Plaintiffs held classified civil service positions in the field service, appointed to their positions by the Civilian Personnel Branch of the Fifth Service Command, acting under express delegation of power from the Secretary of War (R. 4, 29). Plaintiffs' duties were those customarily performed by "fire fighters", including response to calls to extinguish fires, maintenance of fire-fighting equip-

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[1] The facts are set forth in the complaint, supplemented by a brief amendment (R. 19-20) and by affidavit of A. H. Onthank, Director of Civilian Personnel, Department of the Army (R. 28).

[2] The Classification Act of 1923, 42 Stat. 1488, 5 U.S.C. 661 *et seq.*, describes the various classes of persons who may be employed by department heads and at once specifies an entire class of inferior officers and the terms of their appointment, compensation and tenure. The Civil Service Classification Act uses the term "employee" to include anyone holding a classified position, without regard to the distinction between employee and officer raised in this case. 5 U.S.C. 662. It would seem that the term "employee" is similarly used in the Act of June 26, 1930, *supra.*

ment, fire safety inspections and fire safety drills (R. 3). Their hours of work followed the two-platoon system, that is, each crew had a 24-hour tour on duty followed by 24 hours off. During the tour of duty, the men remained on call within the Signal Depot, at or in close proximity to their fire stations, with an allowance of eight hours for sleep and meals, subject to emergency call.

Plaintiffs' regular compensation was based on an annual salary, according to their respective civil service classifications (R. 12). Beginning in December 1, 1942, by extending the scope of prior statutes applicable to a limited group of federal employees, Appendix, *infra,* p. —, Congress directed that most federal civilian employees should be paid overtime compensation. S.J. Res. 170, 56 Stat. 1068 (R. 5; Appendix, *infra,* p. 14). This statute described two classes of "officers or employees": those having an "administrative workweek,"[3] who were to be paid overtime for hours worked in excess of 40 hours per week, and those having irregular or intermittent hours of work, who were to receive a flat increase of 10% over "their earned basic compensation." (R. 5; Appendix, *infra,* p. 14).

By Executive Order 9289 describing them as a class (R. 6; Appendix, *infra,* p. 16),[4] and by War

[3] This class was described by reference to the Act of June 3, 1941, 55 Stat. 241, Appendix, *infra,* p. 14.

[4] Presidential regulations governing overtime pay were authorized by the Act of June 28, 1940, Appendix, *infra,* pp. 15-16.

Department regulations expressly naming them (R. 6; Appendix, *infra,* p. 16), fire fighters were designated as "intermittent or irregular employees" and were paid the flat increase.

When S.J. Res. 170 expired on April 30, 1943, the same scheme of overtime compensation (raised to a 15% allowance) for officers and employees having intermittent or irregular hours was continued by the War Overtime Pay Act of 1943, 57 Stat. 75 (R. 7; Appendix, *infra,* p. 17). This statute authorized the Civil Service Commission to issue appropriate regulations (R. 7; Appendix, *infra,* p. 18); and the Commission continued in effect the terms of the Executive Order authorizing department heads to treat as intermittent or irregular employees those "whose work requires them to remain on or within the confines of their posts of duty for more than 45 hours per week but does not require that all of their time be devoted to actual work" (R. 8; Appendix, *infra,* p. 19). The War Department continued its prior regulations expressly naming fire fighters in this class (R. 8).

The plaintiffs were paid according to these regulations until January 1, 1945. On that date, their overtime pay was computed on a different basis. Plaintiffs were no longer considered as irregular or intermittent employees. Instead, pursuant to amended regulations of the Civil Service Commission (R. 9; Appendix, *infra,* p. 19), employees whose work included periods during which they were required to remain on duty and render stand-

by service, at or within the confines of their stations, were considered as having an "administrative work-week" consisting of all hours of the tour of duty, except those hours allowed for sleep and meals by regulations of the department. The War Department amended its regulations to treat fire fighters on a two-platoon system as working 16 hours out of the 24 hours of a tour of duty, thereby establishing for the plaintiffs a work week averaging 56 hours per week, of which 16 hours were paid for at the rate of time and a half [5] (R. 10-11, Appendix, *infra,* pp. 20-21).

Plaintiffs alleged that the nature of their employment was exactly the same from December 1, 1942, to January 1, 1945, as it was thereafter; that, in fact and in law, they were never intermittent or irregular employees, but were at all times regular full-time employees, entitled to compensation at the rate of time and one-half their fixed rate of pay, for all hours worked in excess of 40 hours a week. They claimed the unpaid overtime for the two-year period, when, by regulation, they were treated as intermittent or irregular employees (R. 12).

Responding to a motion to dismiss the complaint, the district court ruled (1) that fire fighters were "employees" not "officers" of the United States within the meaning of 28 U.S.C. 1346(d)(2), *supra,* p. 2, which removes from the jurisdiction of the district courts civil actions by "officers of the

[5] This amounts to an overtime allowance of 48% of the base pay.

United States" to recover "salary, or compensation for official services"; (2) but that since the overtime regulations were valid, the complaint on its face failed to state a cause of action (R. 18). The Court of Appeals reversed, holding that the district court had jurisdiction; that the overtime regulations were invalid; and that the complaint stated a cause of action on which the plaintiffs were entitled to a trial (R. 37).

REASONS FOR GRANTING WRIT

On both issues involved in the case, there is a conflict of decisions which should be settled by this Court. On the question of jurisdiction, a direct conflict exists with a decision of the Court of Appeals for the Fifth Circuit. *Kennedy* v. *United States,* 146 F. 2d 26 (1944). On the merits, the holding below is in conflict with a decision of the Court of Claims. *Conn* v. *United States,* 107 C. Cls. 422, 68 F. Supp. 966, certiorari denied, 332 U. S. 757, rehearing denied, 332 U. S. 819.

1. *Jurisdiction.* The court below has decided that the claimants were "employees" not "officers" of the United States within the meaning of 28 U. S. C. 1346(d)(2), and hence were not obliged to sue in the Court of Claims for compensation from the United States but could sue in the district court where they resided (28 U. S. C. 1402(a)). Relying mainly upon *Burnap* v. *United States,* 252 U. S. 512, the court below rested its holding on the ground that the claimants could not be "officers"

because the position of fire fighter is not mentioned by name in any federal statute authorizing their employment, and that "an office of the United States does not exist unless it is created by some specific Act of Congress" (R. 39).

In *Kennedy* v. *United States, supra,* however, the Court of Appeals for the Fifth Circuit, passing upon a compensation claim of a civilian employee of the War Department appointed by a subordinate of the Secretary of War under the identical statutory authority involved here, held that the claimant was an "officer" over whose suit the district court had no jurisdiction because of then 28 U. S. C. 41 (20), now 28 U. S. C. 1346(d)(2). Employment authorized by these statutes, the Fifth Circuit held, citing the leading case of *United States* v. *Hartwell,* 6 Wall. 385, meets the long-standing legal definition of an "officer" as a person appointed under authority of law by the head of a department to a permanent position with fixed emolument. (146 F. 2d at 28.) We believe that the ruling of the Court of Appeals for the Fifth Circuit is correct and that the controlling decisions of this Court contradict the notion that Congress is required to enact a specific law designating every inferior "office" in the Government. See *United States* v. *Macdaniel,* 7 Pet. 1; *United States* v. *Birdsall,* 233 U. S. 223.

2. *The merits.* The court below has ruled that the hours during which the plaintiff fire fighters were on call at their stations are to be counted as

hours of the "administrative work-week" within the meaning of the federal statutes governing overtime payments to civilian personnel, and that the regulations defining fire fighters as having intermittent or irregular hours of work were contrary to law and of no effect. The court relied upon *Armour & Co.* v. *Wantock,* 323 U. S. 126, and *Skidmore* v. *Swift & Co.,* 323 U. S. 134, decided December 4, 1944, which held, in cases involving privately employed fire fighters, that their hours on call, except hours allowed for sleep and eating, were part of their compensable time within the meaning of the Fair Labor Standards Act.

Conn v. *United States, supra,* involved on its merits precisely the same claim as the case at bar. The claim there was presented by civilian fire fighters employed at another Army installation. The Court of Claims held that the hours of work of such fire fighters could reasonably be deemed to include only the intermittent or irregular hours of actual work while on call, and that the regulations to that effect, in force from 1942 to 1944, were promulgated under and within the authority expressly conferred upon the President, the Civil Service Commission and the War Department. 68 F. Supp. 966. The decisions in *Armour & Co.* v. *Wantock,* and *Skidmore* v. *Swift & Co.,* were not binding, the Court of Claims held, because of differences in the language of the Fair Labor Standards Act from that of S. J. Res. 170 and of the

War Overtime Pay Act. The 1942-1944 regulations, which were within the express language of the latter statutes, were changed to accord with the *Armour* and *Skidmore* decisions as a matter of discretionary policy, the Court of Claims ruled, and hence it held that the changes were not to be applied retroactively.[6]

3. *Importance.* (a) It is a matter of substantial importance whether, as the court below holds, those of the numerous federal civil service employees[7] who may wish to litigate a dispute over their compensation, except the comparative few whose positions are named in the Constitution or statute, can sue in the district court of their residence or, as the Fifth Circuit has held, only in the Court of Claims. 28 U. S. C. 1346(d)(2) was intended to secure uniform decisions concerning compensation for services rendered to the United States by centralizing compensation suits of "officers" in the Court of Claims[8]—a centralization

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[6] The Civil Service Commission stated that the change was "in accord with" these two decisions "dealing with a similar situation in industry under the Fair Labor Standards Act." Department Circular No. 424, Supp. 4. (R. 10.)

[7] Over 800,000 persons now hold classified civil service positions within the continental United States. The United States Civil Service Commission, *Federal Employees Statistic Bulletin*, May 1950, p. 8.

[8] 28 U.S.C. 1346(d) is derived from the Act of June 27, 1898 (c. 503, Sec. 2, 30 Stat. 494). The House Committee, reporting on the bill, gave as one reason for its enactment "that the circuit and district courts are widely separated geographically, and often while one of them may be deciding a question in one way another may be deciding it another way; and there is now a large number of con-

which does not inconvenience claimants since the Court of Claims exercises its statutory authority to hold its hearings at places convenient to the witnesses. 28 U. S. C. 2505.

(b) The particular compensation claim sued upon in this case involves a fairly large number of persons and great sums of money. It appears that the War Department alone employed, on a two-platoon system, 12,000 to 15,000 civilian fire fighters, who could claim under the decision below that they were denied the full amount of overtime compensation owing to them. It is believed that these claims may total from sixteen to twenty-two million dollars. (Letter of June 20, 1950, from the Department of the Army to the Attorney General, Appendix, *infra*, p. 22). The Navy Department reports that it also employs civilian fire fighters on a two-platoon system, though it cannot furnish actual numbers. The claim here involved is also the subject of current litigation. In *Bruner* v. *United States,* the District Court of the United States for the Middle District of Georgia (Macon Division), Civil Action No. 570, dismissed the suit on authority of *Kennedy* v. *United States, supra,* but an appeal has been taken and is now pending. The United States Attorney at Macon, Georgia, reports that at least 75 claims will be filed in his

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flicting judgments on the same questions." H. Rep. No. 325, 55th Cong., 2d Sess., 1898. Another reason given was that the suits were brought remote from the Capitol where the department involved could not make a "proper defense."

district if the present decision stands. *Robert N. Walsh* v. *United States,* E. D. Pa., Civil Action No. 6388, is a pending suit on behalf of 24 fire fighters. *Lowry* v. *United States,* D. C. N. J., Civil Action No. 359-50, is now pending on behalf of 101 fire fighters, claiming $140,421.78.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.[9]

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1950.

[9] The ruling below, while interlocutory in the sense that the cause is remanded to the district court for trial, is "fundamental to the further conduct of the case" and hence appropriate for review at this time. See *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 685; *Land* v. *Dollar*, 330 U. S. 731, 734; *United States* v. *General Motors Corp.*, 323 U. S. 373, 377.

APPENDIX

1. S. J. Res. 170, Public Law 821, 77th Cong., 2d Sess., 56 Stat. 1068, provides in pertinent part as follows:

> * * * the authorization contained herein to pay overtime compensation to certain groups of employees is hereby extended, effective December 1, 1942, to all civilian employees in or under the United States Government, including Government-owned or controlled organizations * * * *And provided further,* That officers or employees * * * whose hours of duty are intermittent, irregular, or less than full time, * * * shall be paid additional compensation, in lieu of the overtime compensation authorized herein, amounting to 10 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 per annum, and each such employee shall be paid only such additional compensation or portion thereof as will not cause his aggregate compensation to exceed a rate of $5,000 per annum.

2. The Act of June 3, 1941, 55 Stat. 241, one of prior statutes whose limited coverage was extended by S. J. Res. 170, reads in pertinent part as follows:

> * * * compensation for employment in excess of forty hours in any administrative work-week computed at a rate of one and one-half times the regular rate is hereby authorized to be paid, under such regulations as the President may prescribe, to those per an-

num employees in the field service of the War Department, the Panama Canal, the Navy Department, and the Coast Guard, whose overtime services are essential to and directly connected with the expeditious prosecution of the overtime work upon which the employees enumerated in section 5(a) of the Act of June 28, 1940, and section 1 of the Act of October 21, 1940, are engaged: * * * [The Act of June 28, 1940, 54 Stat. 676, authorized overtime for certain employees of the Navy and Coast Guard; the Act of October 21, 1940, 54 Stat. 1205, authorized overtime for certain employees of the War Department and the Panama Canal.]

3. The Act of June 28, 1940, Sec. 5, 54 Stat. 676, 678-679, reads, in pertinent part, as follows:

> * * * the regular working hours of the Navy Department and the Coast Guard and their field services shall be eight hours a day or forty hours per week during the period of the national emergency declared by the President on September 8, 1939, to exist: *Provided,* That under such regulations as the head of the Department concerned may prescribe, and where additional employees cannot be obtained to meet the exigencies of the situation, these hours may be exceeded: *Provided further,* That compensation for employment in excess of forty hours in any administrative workweek computed at a rate not less than one and one-half times the regular rate shall be paid * * * *And provided further,* That not-

withstanding the provisions of any other law, the President is hereby authorized, in his discretion, to prescribe regulations to establish such uniformity among the War and Navy Departments and the Coast Guard and their field services in regard to hours of work and compensation for overtime of their civilian employees as he may deem necessary in the interest of national defense.

4. Executive Order 9289, 7 F. R. 10897, 3 C. F. R. (Cum. Supp.) 1244-1245, reads in pertinent part as follows:

Section 7. Employees such as certain forest-fire lookouts, forest guards, and lighthouse keepers the nature of whose work (as determined by the head of the department or agency concerned) requires them to remain at or within the confines of their posts of duty for more than 40 hours per week but does not require that all of their time be devoted to actual work shall be considered to have intermittent or irregular hours of duty within the meaning of the last proviso of section 1 of the said Senate Joint Resolution 170, 77th Congress.

5. Orders "U" of the Secretary of War (See R. 6), issued December 26, 1942, read in pertinent part as follows:

9(a) Employees such as fire fighters who because of the nature of their work are required to remain at or within the confines of their posts of duty for more than 40 hours per week, but who are not required to devote all their

time to actual work, will be considered to have intermittent or irregular hours of duty and are subject to the provisions of this paragraph.

6. The War Overtime Pay Act, Act of May 7, 1943, 57 Stat. 75, reads in pertinent part as follows:

> * * * this Act shall apply to all civilian officers and employees * * * in or under the United States Government, including Government-owned or controlled corporations, and to those employees of the District of Columbia municipal government who occupy positions subject to the Classification Act of 1923, as amended, * * *.
>
> SEC. 2. Officers and employees to whom this Act applies and who are not entitled to additional compensation under section 3 shall be paid overtime compensation computed on the same basis as the overtime compensation which was authorized to be paid under Public Law Numbered 821, Seventy-seventh Congress: * * *.
>
> SEC. 3. (a) Except as provided in subsection (c), officers and employees to whom this Act applies and whose hours of duty are intermittent or irregular, officers and employees in or under the legislative and judicial branches * * * to whom this Act applies, * * * shall be paid, in lieu of the overtime compensation authorized under section 2 of this Act, additional compensation at the rate of (1) $300 per annum if their earned basic compensation

is at a rate of less than $2,000 per annum, or (2) 15 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 per annum if their earned basic compensation is at a rate of $2,000 per annum or more.

* * * * *

SEC. 9. The Civil Service Commission is authorized and directed to promulgate such rules and regulations as may be necessary and proper for the purpose of coordinating and supervising the administration of the provisions of the foregoing sections of this Act insofar as such provisions affect employees in or under the executive branch of the Government.

7. The Civil Service War Overtime Pay Regulations issued under Section 9 of the War Overtime Pay Act, 8 F.R. 6149, 5 C.F.R. (Cum. Supp.) Part 20, read in pertinent part as follows:

§ 20.3 *Administrative workweek for full time employees.* The administrative workweek for each group of full time employees shall be the minimum number of hours of work per week specified by the general public regulations issued by the head of a department or independent establishment pursuant to section 2 of the Act of March 14, 1936 (49 Stat. 1161, 5 U.S.C. 29a), and in accordance with applicable circulars of the Bureau of the Budget.

* * * * *

§ 20.7 *Intermittent or irregular employees.* Intermittent or irregular employees who are not regularly required to work a specified minimum number of hours. Employees whose work requires them to remain at, or within, the confines of their posts of duty for more than forty hours per week, but does not require that all of their time be devoted to actual work, may be considered to be intermittent or irregular employees, or in the discretion of the head of the department or agency concerned, may be considered to be full time employees having such administrative workweek as is specified by such head.

8. The amendments to the Civil Service Overtime Pay Regulations, 5 C.F.R. (1945 Supp.) Part 20, read in pertinent part as follows:

§ 20.3 *Administrative work-week for full-time employees.* (a) The administrative work-week for each group of full-time employees shall be the minimum number of hours of work per week specified by the general public regulations issued by the head of a department or independent establishment pursuant to section 2 of the Act of March 14, 1936, 49 Stat. 1161, 5 U.S.C. 29a, and in accordance with applicable circulars of the Bureau of the Budget.

(b) In the case of employees whose work includes periods during which they are required to remain on duty and render "stand-by service" at or within the confines of their stations, the administrative work-week, for the

purposes of the regulations in this part shall be the total number of regularly scheduled hours of duty per week (or in rotating-shift systems, the average number of regularly scheduled hours of duty per week for the cycle), including all such "stand-by" or "on call" time except that allowed by regulation of the department or independent establishment for sleep and meals.

§ 20.7 *Intermittent or irregular employees.* Intermittent or irregular employees are employees who are not regularly required to work a specified minimum number of hours in an administrative work-week.

9. The War Department Civilian Personnel Circular No. 13, issued January 25, 1945, reads in pertinent part as follows (R. 10-11):

2. On call employees are those employees who are required to remain at or within the confines of a designated post of duty for more than 40 hours a week for the purpose of rendering stand-by service but who are not required to spend all of their tour of duty in the actual performance of work. A notable example of on call employees are firefighters who are on duty 24 hours and off duty 24 hours or whose tour is a variation of this form of the two platoon system. Fire chiefs, assistant fire chiefs, fire inspectors and fire-fighting crews of crash trucks may be considered either as on call employees or full time employees, depending upon their established tour of duty and the requirements of their work assign-

ment. On-call employees should be distinguished from those employees who have a regularly scheduled tour of duty which does not include time spent in stand-by service but who may, on occasion, be required to remain on duty beyond their tour in order to render such service. * * *

3. No later than April 1, 1945, the tours of duty for all on-call employees will be fixed upon one of the following bases: (2) 24 hours on duty followed by 24 hours off duty, thus completing a total of 168 hours of duty in a bi-weekly period. * * *

4. The employees referred to in paragraph (3)(a) * * * will be considered as working 16 hours within the spread of each 24 hours daily tour of duty. The other 8 hours of the tour will be considered as the amount of time spent in stand-by service during which the employee is free to eat or sleep. No action will be taken to set aside a specific portion or portions of the tour for this purpose and there is no change in the present requirement that the employees be present for duty or in a leave with pay status during the full tour in order to be eligible for full compensation. Rather, the employee will be considered as being on duty total time, but the fact that a portion of the tour is not active duty will be recognized in computing overtime compensation. This arrangement results, in effect, in the establishment of an average work week of 56 hours for the employees referred to in paragraph (3) (a)

* * *. Regular prorated overtime compensation will be computed on the basis of the average work week so established. The provisions for the payment of overtime compensation retroactively to January 1, 1945 are mandatory.

10. The letter of June 20, 1950, from the Department of the Army to the Attorney General reads as follows:

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

JAGL 1948/8326 20 June 1950.

The Honorable
The Attorney General

Re: *William A. Beal, et al.* v. *United States*
(your ref. HGM:JMG 78-30-12)

Dear Mr. Attorney General:

Reference is made to your letter, dated 5 June 1950, relating to this case.

It is the recommendation of this office that you apply for certiorari in this case because of the importance that will be attached to the decision, dated 29 May 1950, by the United States Court of Appeals, Sixth Circuit, in the other suits now pending and which may be filed in the near future involving other firefighters.

It is estimated that there are potentially 12,000 to 15,000 of these claims for overtime

pay and that in the event all the claims are asserted they present claims which will total from $16,000,000 to $22,000,000.

Sincerely yours,

(S.) ROBERT W. BROWN,
Brigadier General, USA,
Assistant Judge Advocate General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 266.

UNITED STATES OF AMERICA, *Petitioner,*

v.

WILLIAM A. BEAL, ET AL.

BRIEF IN OPPOSITION.

MONROE OPPENHEIMER and
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 266.

UNITED STATES OF AMERICA, *Petitioner,*

v.

WILLIAM A. BEAL, ET AL.

BRIEF IN OPPOSITION.

William A. Beal, et al., Respondents, file this their brief in opposition to the issuance of a writ of certiorari to the Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The District Court for the Eastern District of Kentucky did not issue any opinion to accompany its order. (R. 18) The opinion of the Court of Appeals for the Sixth Circuit (R. 37) is reported at 182 F. (2d) 565.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 29, 1950. Jurisdiction of this Court is invoked by the United States under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in holding that *Armour & Co.* v. *Wantock,* 323 U. S. 126 and *Skidmore* v. *Swift & Co.,* 323 U. S. 134, required the Government, like private employers, to pay its employees time and one-half for stand-by duty.

2. Whether the Court of Appeals erred in holding that employees of the Federal Government, appointed to positions not created by an Act of Congress, are not "officers of the United States," within the meaning of 28 U. S. C. 1346(d)(2) and hence may sue the United States for salary claims in the district court of the district where they reside rather than being required to bring such action in the Court of Claims.

STATUTES AND REGULATIONS INVOLVED.

The applicable statutes and administrative regulations are adequately set forth in the Petition for Certiorari at pages 2, 3 and 14 to 22.

STATEMENT OF FACTS.

The facts in the case are adequately set forth in the Petition for Certiorari at pages 3 to 8.

REASONS FOR DENYING THE WRIT.

Summary.

As to the merits, the decision below was plainly right. The Court of Claims decision in *Conn* v. *United States* is readily distinguishable in terms of the extreme position taken by plaintiff's counsel in that case. In any event, the issue is not now of general importance as the six year Statute of Limitations (28 U. S. C. 2501) has already virtually barred any claim not already in litigation.

As to the jurisdictional issue, there is no real conflict between the decision below and the decision in *Kennedy* v.

United States (5th Cir. 1944) 146 F. (2d) 26. The decision below simply followed the elementary principle, last applied by this Court in *Burnap* v. *United States,* 252 U. S. 512, that, regardless of other factors, an "office" of the United States cannot exist unless created by some specific Act of Congress. The opinion in the *Kennedy* case did not even advert to this issue, as the parties had stipulated that the position in question had been authorized by Act of Congress.

Discussion.

1. *The decision below was correct on the merits.*

The court below held that the hours during which the plaintiff fire fighters were on call at their stations were to be counted as compensable work, and hence their hours of duty had "no aspect of irregularity or intermittency" to justify denying compensation at time and one-half for overtime. In so holding, the court followed the principle established in *Armour & Co.* v. *Wantock,* 323 U. S. 126 and *Skidmore* v. *Swift & Co.,* 323 U. S. 134.

It is true, as the Government states, that the *Armour* and *Skidmore* cases involved private employers under the Fair Labor Standards Act, while the case below involved the Government as employer under the War Overtime Pay Acts. The court below, however, concluded that this was a distinction without a difference and that this Court's reasoning under the Fair Labor Standards Act was equally applicable under the War Overtime Pay Acts. It should be here noted that after the decisions in the *Armour & Co.* and *Skidmore* cases the Civil Service Commission, without waiting for Congress to make any change in the War Overtime Pay Acts, adopted the rationale of those cases in new regulations which it applied to stand-by duty performed by government employees after the decisions in those cases were rendered. In the light of this action of the Commission, the court below correctly concluded that if, without amendment of the statutes, stand-by duty was compensable

work *after Armour & Co.* and *Skidmore* it must have been compensable work *prior* to said decisions.

The Government, in seeking certiorari, claims that the decision below is in conflict with the prior decision by the Court of Claims in *Conn* v. *United States,* 107 Ct. Cls. 422, 68 F. Supp. 966, which also involved civilian fire fighters working alternate 24-hour tours of duty requiring them to spend an average of 84 hours per week on the premises they were protecting. But, the *Conn* case involved a much different claim from that urged by the plaintiffs below. There, *Conn* argued that the entire 84 hours per week spent on the protected premises should be counted as compensable work —without even excluding the time allowed Conn for eating and sleeping. In other words, Conn asked overtime pay for 44 hours a week, including the hours during which he slept and ate his meals. Faced with this contention, the Court of Claims understandably held that to allow such a recovery would give Conn a wage increase of 165 per cent, a result it understandably felt could not have been intended by Congress.[1]

The correct principle, of course, is that announced by this Court in the *Armour* and *Skidmore* cases, supra, and adopted by the court below, i. e., that time for sleeping and eating must be deemed personal so that only 56 of each week's 84 hours on the premises were compensable. With the problem so viewed, the difficulties envisioned by the

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[1] Thus the Court said, 107 Ct. Cls. 422 at p. 460, 68 F. Supp. 966, 972: "If the plaintiffs' contention that they should be placed in the classification of employees entitled to overtime compensation at time and one-half, [were accepted] they would receive, upon the basis of their full 24-hour tours of duty an increase of 165 per centum in their pay. [Under] A similar application of the statute to lighthouse keepers and other similar groups of employees required to remain, subject to call, at their post of duty for more than 84 hours per week, which was the average number of hours in plaintiffs' tours of duty, the increased overtime compensation payable under the statute could amount to as much as 480 per centum. We do not think Congress intended such results." (The bracketed words have been supplied in order to correct the obvious typographical omissions in the opinion of the Court.)

Court of Claims disappear and the decision below becomes the only tenable one. Indeed, we believe it safe to assume that in the unlikely event that new suits should be filed (a contingency discussed below) the Court of Claims itself would adopt the rationale of the court below and distinguish the *Conn* decision on its special facts.

2. *The Statute of Limitations Has Deprived the Issue on the Merits of Any General Importance.*

Only three other suits[2] are still pending in the courts involving the validity of the regulations passed on by the court below. Accordingly, the Government's claim that the problem is still of general importance depends on the validity of the Government's estimate that there are another 12,000 to 16,000 additional claims which may "potentially" be asserted by litigation.

With all deference to the sincerity of the Government's concern, we respectfully submit that its apprehensions are wholly unrealistic, as the statute of limitations has already effectively barred all but a negligible portion of any claims upon which suit has not already been instituted. *The regulations in question* only cover the pay periods from December 2, 1942, to December 31, 1944. Hence, as of today (September 15, 1950) every one of these "potential" overtime suits has already been barred for the 96 weekly pay periods preceding September 15, 1944, leaving only the 12 pay periods, October 1, 1944 to December 31, 1944, for which suit can still be filed. Indeed, by the time the present case could be argued and decided by this Court, the six-year statute of limitations would have barred the filing of suits even with respect to these 12 weekly pay periods. It does not appear, therefore, that there is any real likelihood of the issue below assuming any such general importance as to warrant review by certiorari.

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[2] The three suits are listed at pp. 12 and 13 of the Petition for Certiorari.

3. *As to Jurisdiction.*

The plaintiffs were appointed (S. R. p. 2) under the omnibus authority of 5 U. S. C. 43, providing that:

> There is authorized to be employed in each executive department, independent establishment * * * such number of employees of the various classes recognized by the Classification Act of 1943 * * * as may be appropriated for by Congress from year to year * * *

Plaintiffs were paid under the War Department Appropriation Acts for 1943 and 1944 which made no reference to any particular offices or classes of offices but merely appropriated funds for "salaries of civilian employees."[3] Nor was there any other legislation in which the office of fire fighter is referred to or its duties prescribed. The case, therefore, is governed squarely by *Burnap* v. *United States*, 252 U. S. 512, 516. As the court below pointed out (182 F. (2d) at 568) the rule in the *Burnap* case is clear that "an office of the United States does not exist unless it is created by some specific Act of the Congress * * *"

Kennedy v. *United States*, 146 F. (2d) 26, did not go off on this issue. In that case a suit for salary was filed by a civilian instructor at an Air Force School, appointed under the omnibus authority of 5 U. S. C. 43, supra. However, the question of whether, under the doctrine of the *Burnap* case, the position was one authorized by Congress was never argued. In the District Court (54 F. Supp. 446) the parties had entered into a Stipulation of Facts eliminating any such issue by the recital that "the laws authorizing the position to which plaintiff was appointed * * * are the Military Appropriation Acts, etc. * * *" Accordingly, on appeal, the Court of Appeals for the Fifth Circuit did not even advert to the question of whether there was a law creating the office, but simply accepted the

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[3] The Military Appropriation Act of 1943 (P. L. 649, 77th Cong.); The Military Appropriation Act of 1944 (P. L. 108, 78th Cong.).

stipulation of the parties by reciting (146 F. (2d) at p. 28) "the stipulated facts show that * * * his appointment was made with the approval of the Secretary of War, acting pursuant to Acts of Congress which authorized the position to which appellant was appointed * * *"

There is, accordingly, no actual conflict between the opinion below and the opinion in the *Kennedy* case, which far from refusing to follow *Burnap* v. *United States,* was so little concerned with the issue that the Court's opinion does not even refer to the case.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this is not an appropriate case for granting certiorari.

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